

STATE OF MICHIGAN
COURT OF APPEALS

EMPIRE FIRE AND MARINE INSURANCE
COMPANY,

UNPUBLISHED
March 9, 2010

Plaintiff-Appellant,

v

No. 289695
Macomb Circuit Court
LC No. 2007-004794-CK

MICHAEL V. LYNCH, d/b/a HEIGHTS AUTO
SALES, and CHRISTOPHER LYNCH,

Defendants-Appellees,

and

WIDAD DAWOOD,

Defendant.

Before: SERVITTO, P.J. and BANDSTRA and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's orders granting summary disposition to defendants-appellees and denying reconsideration. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The trial court's opinion and order on plaintiff's motion to correct the record and for reconsideration includes a concise statement of the background facts:

Plaintiff filed this action on November 6, 2007 asserting defendant Michael V. Lynch formerly operated Heights Auto Sales and is the father of defendant Christopher Richard Lynch. Plaintiff acknowledged issuing garage liability and umbrella insurance policies to defendant Michael Lynch that were in effect on July 21, 2005.

On July 21, 2005, plaintiff averred defendant Christopher Lynch was operating a 1996 Nissan Sentra . . . that was owned by Heights Auto Sales when

he collided with a vehicle driven by defendant Widad Dawood.^[1] Defendant Dawood subsequently filed a lawsuit (“the underlying action”) against defendant Christopher Lynch and Heights Auto Sales. Plaintiff contended there was no coverage for the accident in the underlying action because defendant Christopher Lynch was not driving the Sentra in the garage operations of Heights Auto Sales.

Accordingly, plaintiff’s complaint sought a declaratory judgment that the insurance policies did not provide any liability coverage for the accident.

A *Default* was entered against defendant Dawood on April 17, 2008 for failure to plead or otherwise defend.^[2]

On September 22, 2008, plaintiff moved for summary disposition under MCR 2.116(C)(10). An *Opinion and Order* dated November 3, 2008 denied plaintiff’s motion but granted defendants Michael Lynch and Christopher Lynch’s countermotion for summary disposition, holding plaintiff must defend and indemnify defendants Michael Lynch and Christopher Lynch in any bodily injury lawsuit arising from the accident.

Not in dispute is that, at the time of the accident, defendant Christopher Lynch was on duty at his part-time job with a pizza establishment and was returning from a pizza delivery, with the pizzeria’s sign on display on the Sentra, when the collision occurred. Apparently the only indication that the Sentra was associated with Heights Auto Sales was that it displayed dealer plates instead of ordinary license plates.

The trial court granted summary disposition to defendants on the grounds that Christopher was driving the car with his father’s permission, and that, even while doing so in the course of his employment with the pizzeria, he was also operating in a manner incidental to the business of the dealership by showing the car as an advertisement for that business.

After the trial court issued its opinion and order initially disposing of this case, plaintiff moved to correct the record and for reconsideration. In the opinion and order that followed, the court articulated a few minor factual corrections, but otherwise denied reconsideration.

This Court reviews a trial court’s decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). The construction and interpretation of an insurance contract likewise presents a question of law calling for review de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

The primary goal in contract interpretation is to ascertain and effectuate the intent of the parties. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). To determine

¹ Plaintiff advises that Ms. Dawood was in fact a passenger in the other car, not its driver.

² Defendant Dawood is likewise not participating in this appeal.

the parties' intent, this Court will read the contract as a whole and attempt to apply its plain language. *Id.* Where the contractual language is not ambiguous, its construction is a question of law for the court. See *id.* at 63-64.

In this case, the liability policy describes its coverage as follows: "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from 'garage operations' involving the ownership, maintenance or use of 'covered autos.'" "Garage operations" is defined as "the ownership, maintenance or use of locations for garage business and that portion of the roads or other accesses that adjoin these locations." "Garage operations" is further defined to include "the ownership, maintenance or use of 'autos'" and "all operations necessary or incidental to a garage business." Insured persons include persons using a covered vehicle with the permission of the policyholder unless specifically excluded. The definition of "garage operations" in the umbrella policy closely mirrors that of the primary policy, including by specifying that the definition of "garage operations" includes "all operations necessary or incidental to the garage business."

This case hinges on whether Christopher Lynch's use of the Nissan Sentra at the time of the subject collision constituted a use that was incidental to Heights Auto Sales' dealership business. We conclude that it was not.

"It is impossible to hold an insurance company liable for a risk it did not assume." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). In this case, Christopher Lynch was using the Nissan Sentra for all ordinary and everyday purposes, including performing employment duties unrelated to the dealership, which, in this state, calls for the protection of a no-fault policy designed and priced for such plenary usage. Plaintiff, in issuing a garage liability policy, assumed the risks inherent in such incidental dealership business as moving cars around on a lot, or perhaps from the primary business location to that of another business for service. If exposing a car to other persons thereby furthers the dealership's business by potentially interesting those others in the car or the dealership, it is difficult to think of a usage of the car that would not thus constitute dealership business. The policy at issue was issued to cover vehicles mainly confined to the dealership grounds and the risks attendant to such limited use, not vehicles on the streets for normal sundry uses and thus exposed to the full range of risk attendant to such usage.

We conclude that a car being used in the pizza delivery business, conspicuously displaying the pizzeria's advertising while advertising its relationship to a dealership only by way of displaying dealer plates instead of ordinary license plates, is not a car being used for purposes incidental to that dealership for purposes of coverage under that dealership's garage liability policy. For these reasons, we reverse the grant of summary disposition to defendants, and remand this case to the trial court with instructions to grant summary disposition to plaintiff.

We reverse and remand. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood